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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BRADLEY ZOOK, Defendant and Appellant.	2d Crim. No. B230597 (Super. Ct. No. GA075913) (Los Angeles County)

Bradley Zook appeals the judgment following his convictions for arson of an inhabited structure (Pen. Code, § 451, subd. (b)),[1] first degree residential burglary (§ 459), and conspiracy to commit grand theft (§ 182, subd. (a)(1)). The jury found to be true an allegation that he took, damaged or destroyed property valued in excess of $200,000. (§ 12022.6, subd. (a)(2).) The trial court found to be true allegations that he had two prior serious or violent felony convictions for purposes of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1), and one prior conviction for purposes of section 667.5, subdivision (b). Zook was sentenced to a prison term of 72 years to life. The sentence consisted of 25 years to life for the arson plus 10 years for the section 667, subdivision (a) enhancement and two years for the section 12022.6, subdivision (a)(2) enhancement, and 25 years to life for the burglary

[1] All statutory references are to the Penal Code unless otherwise stated.

plus 10 years for the section 667, subdivision (a) enhancement. All terms were ordered to run consecutively. The section 12022.6, subdivision (a)(2) allegation was dismissed as to the burglary, and the section 667.5 allegation was stricken. The sentence for taking, damaging or destroying property was stayed pursuant to section 654.

Zook contends there was insufficient evidence to support his convictions due to the erroneous admission of hearsay evidence and that the trial court erred by instructing the jury that it could find arson to be a natural and probable consequence of burglary. He also claims the trial court erred in imposing consecutive sentences for the arson and burglary, and abused its discretion in denying his *Romero* motion.[2] He also asks this court to review the trial court's in camera hearing on his *Pitchess* motion,[3] and seeks a correction in a minute order and the abstract of judgment. We will reverse Zook's conviction for arson and order a correction in the abstract of judgment. Otherwise, we affirm.

FACTS AND PROCEDURAL HISTORY

In December 2008, Tollamae Caswell was a 50-year resident of a home in Temple City, California. Caswell and her deceased husband had extensive collections of antique dolls, trains, coins, and Disney memorabilia. The house was unoccupied from December 20, 2008, until December 27, 2008, while Caswell was on a cruise. Caswell secured the house before she left, and informed the sheriff's department and neighbors that she would be gone.

At 4:50 a.m. on December 26, 2008, a sheriff's deputy found the house engulfed in flames. After the fire was extinguished, arson investigator Sergeant Michael Costleigh determined that the fire originated in the living room near the front door, and concluded that the fire was started intentionally. The house had been ransacked and property was strewn around and broken. Caswell and her daughter later confirmed that many items were missing, including a coin collection, antique dolls, and Mickey Mouse dolls.

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[2] (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.)
[3] (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

At 12:50 a.m. on December 26, 2008 (before the fire), sheriff's deputies arrested Zook in a hotel parking lot for reasons unrelated to the charged offenses. Zook told the deputies he was staying in a room at the hotel with his son Joshua Zook.[4] After securing Zook in their patrol car, the deputies went to the hotel room where Joshua confirmed that Zook was staying in the room. The deputies saw approximately 50 antique dolls and Mickey Mouse dolls in the room as well as coins in boxes and other personal property. Joshua told the deputies that he had inherited the property and was selling it on eBay. The officers transported Zook to jail, but left Joshua and the personal property behind without taking further action.

At 11:37 a.m. on December 26, 2008, Zook telephoned Joshua's mother from jail and spoke with Joshua. Joshua told Zook that he got everything out of the hotel room. Joshua bragged, "That was smooth, huh?" and Zook replied, "Yeah," and "that's amazing." Zook warned Joshua that the police would investigate the property but Joshua assured Zook that, "The spot is no longer . . . it doesn't exist." Joshua also stated, "I had to get rid of the whole place. . . . like with a lighter." Zook asked Joshua, "so you're clear and focused on what time it is, and what needs to be done . . .?" Joshua said the situation was under control and he was taking "everything" to a "spot." Zook was released from jail later on the same day.

On February 25, 2009, city police found a parked pickup truck registered to Zook, and arrested Joshua when he arrived to drive the truck away. Joshua had a bracelet and marijuana in his possession and the truck contained suspicious items, including jewelry and coins. Caswell identified an item of jewelry as hers.

On July 2, 2010, Sergeant Costleigh interviewed Zook's friend George Chase. Zook had visited Chase a couple of days after Zook had been released from jail on December 26, 2008. Chase told Sergeant Costleigh that Zook admitted that he and his son Joshua had gone into the Caswell house and disposed of goods stolen from the house. Zook also told Chase that he had left his fingerprints in the Caswell garage.

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[4] We will refer to Zook's son, Joshua Zook, by his first name for convenience.

Zook testified on his own behalf at trial. He denied any role in the charged offenses and denied staying with Joshua in the hotel room in late December 2008. Zook testified that he suspected that Joshua was involved in criminal behavior and that, although his jailhouse telephone call to Joshua concerned Joshua running afoul of the law, it had nothing to do with the burglary of Caswell's house. Zook also denied having any conversation with George Chase regarding stolen property.

DISCUSSION

Substantial Admissible Evidence Supports Burglary Offense

Zook contends the trial court erred in admitting hearsay evidence of his purported statements to Chase and that, without this evidence, there was no substantial evidence to support his convictions. We disagree.

Evidence of out-out-court statements offered to prove the truth of the matter stated is hearsay, but such evidence is admissible if it qualifies under an exception to the hearsay rule. (Evid. Code, § 1200, subd. (a); *People v. Lewis* (2008) 43 Cal.4th 415, 497.) Exceptions to the hearsay rule relevant to this case are statements by a declarant who is a party (Evid. Code, § 1220), statements by a declarant contrary to his or her penal interest (Evid. Code, § 1230), and prior inconsistent statements by a witness (Evid. Code, § 1235). We review a trial court's ruling on admission of evidence for abuse of discretion, and will uphold the ruling unless it is arbitrary or capricious. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

The challenged evidence consisted of the incriminating statements purportedly made by Zook to George Chase as related by Chase to Sergeant Costleigh during the July 2, 2010, interview. Prior to trial, Chase changed his story, claiming that some of the statements he attributed to Zook were not actually made by Zook. Zook filed a pretrial motion to exclude Chase's testimony for this reason. The trial court denied the motion, but agreed to admonish Chase that he could testify only as to statements actually made by Zook to Chase.

When Chase testified at trial, the court gave the promised admonition. Chase then testified that Zook had come to Chase's house in late December 2008, and

told Chase that he had been arrested. But, Chase could not remember whether Zook "said anything really specific beyond that." Chase testified that he did not remember Zook telling him about disposing of stolen property or going into the Caswell house, and that he never told Sergeant Costleigh that Zook had made such statements.

In response to Chase's testimony, the prosecution called Sergeant Costleigh. Costleigh testified that, during his interview with Chase on July 2, 2010, Chase claimed that Zook had made the incriminating statements to Chase. Chase told Costleigh that Zook had stated that he was "unloading stuff that [he had] stolen" when he was arrested on December 26 and worried that the police would "put 2 and 2 together." According to Costleigh, Zook also told Chase that he was not wearing gloves when he went into the Caswell garage. There was, however, one inconsistency in Costleigh's testimony. On direct examination, Costleigh testified that Chase answered "yes" when asked whether Zook admitted going into the Caswell house but, on cross-examination, he testified that Chase did not claim Zook made that statement "personally."

The statements made by Chase to Sergeant Costleigh are admissible under the prior inconsistent statement exception to the hearsay rule in order to impeach Chase's trial testimony and as substantive evidence of the content of the statements. The statements made by Zook to Chase are admissible under the exception to the hearsay rule for party admissions.

Zook concedes Costleigh's testimony would have been admissible if Chase's testimony was actually inconsistent with his prior statements and if the statements attributed to Zook were actually made by Zook. But, Zook argues that Chase's trial testimony was not inconsistent with prior statements to Costleigh. He notes that Costleigh admitted Chase did not claim Zook "personally" told him that Zook entered the house, and claims that the other statements attributed to Zook by Chase were not sufficiently relevant or incriminating to be admissible.

As Zook argues, the prosecution had the burden of producing evidence establishing the foundational requirements for admissibility of the evidence. (*People v. Morrison* (2004) 34 Cal.4th 698, 724; see also *People v. Cudjo* (1993) 6 Cal.4th 585,

608; Evid. Code, § 550.) The direct testimony of a single witness is sufficient to support a finding unless the testimony is physically impossible or its falsity is apparent "'without resorting to inferences or deductions.'" (*Cudjo,* at p. 608.) Except in these rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution and doubt is not a basis for excluding the evidence. (*Id.* at p. 609.)

Here, although Costleigh was equivocal as to the entry into the house admission, Costleigh's version of his interview with Chase clearly attributed other incriminating statements to Zook. Zook told Chase that Zook had stolen property from the Caswell house and was not wearing gloves when he went into the Caswell garage. Furthermore, the trial court could reasonably conclude that the statement regarding entry into the house was made by Zook to Chase. In addition, Zook's argument goes more to the weight of the evidence than its admissibility. Admission of the evidence did not mean the jury was required to accept it. The jury was free to believe Chase's trial testimony and reject Costleigh's version.

Insufficient Evidence for Natural and Probable Consequences Instruction

The prosecution's theory was that Joshua alone set fire to the Caswell house, but Zook was guilty of arson because it was a natural and probable consequence of the burglary. The jury was instructed consistent with this theory. Zook contends there was insufficient evidence to support the jury instruction. We agree.

"A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime." (CALCRIM No. 417.) "A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy . . . even if the act was not intended as part of the original plan. Under this rule, a defendant who is a member of the conspiracy does not need to be present at the time of the act." (*Ibid.*; *People v. Prieto* (2003) 30 Cal.4th 226, 249-250; *People v. Hardy* (1992) 2 Cal.4th 86, 188.)

"A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes." (CALCRIM No. 417.) In other words, the test is objective and an offense is a natural and probable consequence of a planned offense only if its occurrence was reasonably foreseeable to a reasonable person in the defendant's position. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133; *People v. Medina* (2009) 46 Cal.4th 913, 920.)

There are limits on the scope of the natural and probable consequence doctrine. The second offense need not be a highly probable result of the first offense, commission of the target crime, but there must be a "close connection" between the crime intended and the additional offense actually committed. (*People v. Medina, supra*, 46 Cal.4th at p. 920; *People v. Hoang* (2006) 145 Cal.App.4th 264, 269.)

The limits on the natural and probable consequence doctrine are illustrated by a recent case concerning liability for dissuading a witness from testifying as to the planned offense. In *People v. Leon* (2008) 161 Cal.App.4th 149, 153-155, the defendant gang member broke the window of a parked car. When witnesses threatened to call the police, a fellow gang member looked at the witnesses and fired a gun in the air. The defendant was convicted of witness intimidation as a natural and probable consequence of the target offenses of burglary and possession of a concealed and loaded firearm by an active participant in a criminal street gang. (*Id.* at pp. 159-160.) The court rejected such an expansive notion of the natural and probable consequences doctrine, stating that there is no close connection between witness intimidation and burglary or illegal possession of a weapon. (*Id.* at p. 161.)

There is even less of a connection between burglary and arson, and no case applying the natural and probable consequence doctrine in a burglary-arson case has been cited by the parties or found by this court. An act of violence against a victim who discovers a burglary in progress is likely to be considered a natural and probable consequence of the burglary, but it is not reasonably foreseeable that a co-conspirator would return to the scene of a burglary to commit arson as a means of destroying evidence.

In general, whether an additional offense is a natural and probable consequence of a planned offense is a factual question to be resolved by the jury. (*People v. Cummins* (2005) 127 Cal.App.4th 667, 677.) But, in this case the connection between the burglary and the arson is too attenuated. There was insufficient evidence of foreseeability to justify the instruction.[5]

No Error in Denial of Romero Motion

Zook contends that the trial court abused its discretion in denying his motion to strike one of his prior serious and violent felony convictions for purposes of sentencing under the Three Strikes law. We disagree.

A trial court has the discretion to strike a prior conviction for purposes of sentencing if the defendant falls outside the spirit of the Three Strikes law. (§ 1385; *People v. Superior Court (Romero), supra,* 13 Cal.4th at pp. 529-530.) In deciding whether to exercise its discretion, the court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Failure to strike a prior conviction is likely to be considered abuse of discretion only in extraordinary cases where the trial court was unaware of its discretion, or considered impermissible factors. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

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[5] Because we conclude that the arson conviction must be reversed, we do not address the issue raised by Zook regarding whether section 654 prohibited the trial court from imposing consecutive sentences for the burglary and arson.

There was no abuse of discretion in this case. The record reflects that the trial court was aware of its sentencing discretion under section 1385, did not consider any impermissible factors, and examined Zook's prior criminal record and the current offense prior to making its ruling. Zook emphasizes the remoteness in time of his prior strike convictions, but ignores his lengthy criminal history thereafter. Zook was convicted of two residential burglaries in 1983. Thereafter, he was convicted of possession of a controlled substance, giving false information to and resisting a police officer, prison escape with force, a further drug offense in 2001, and resisting a police officer in 2004. Although several of his crimes between 1983 and the charged offenses were relatively minor, they were repeated and frequent.

Zook also cites his drug addiction as a factor, but nothing in the record indicates that he has taken any steps to rehabilitate and his background, character and prospects do not present a realistic chance that his criminal behavior will stop.

Independent Review of Pitchess Hearing

Zook requests independent review of the trial court's in camera hearing on his *Pitchess* motion to determine whether any records were improperly withheld. (*Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531.) We have conducted such an independent review and conclude the trial court did not abuse its discretion in finding no discoverable records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229-1232.)

Correction in Abstract of Judgment

Zook contends the abstract of judgment must be corrected to conform to the trial court's oral pronouncement of sentence. We agree. In the oral pronouncement and clerk's minute order, the trial court sentenced Zook to concurrent 25 years to life sentences for arson (count 1) and burglary (count 2), and stayed execution of the sentence for conspiracy (count 5). The abstract reflects sentences of 25 years to life for counts "1, 2, 3." There is no count 3 in this case and, as stated, the sentence for count 5 was stayed.

DISPOSITION

The judgment is reversed as to the arson (count 1), and the enhancements as to that count for violation of section 667, subdivision (a)(1) and pursuant to section

12022.6 are stricken. The matter is remanded for resentencing. The trial court is also directed to prepare an amended abstract of judgment correcting the sentence for conspiracy (count 5) and forward a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Laura F. Priver, Judge

Superior Court County of Los Angeles

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